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Supreme Court, U.S.
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Supreme Court of the United States

NICHOLAS DeMERIE,

Petitioner,

-v-

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the United States Court of Appeals for the Eleventh Circuit in denying petitioner's application for a certificate of appealability and dismissing his appeal properly followed the standard set forth in *Miller-el v Cockrell*, 537 U.S. 322 (2003) and *Slack v McDaniel*, 529 U.S. 473 (2000) in holding petitioner did not make a "... substantial showing of the denial of a constitutional right." 28 U.S.C. §2235(c).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Nicholas DeMerie, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit denying petitioner's application for a certificate of appealability and dismissing his appeal.

DECISIONS AND ORDERS BELOW

The order and decision of the United States Court of Appeals for the Eleventh Circuit denying the application for a certificate of appealability is reproduced as App. B. The decision of the United States District Court for the Middle District of Florida denying petitioner's application for relief under 28 U.S.C. 2254 is reproduced as App. A. and the decision denying a certificate of appealability is reproduced in the appendix as App. A. The Notice of Appeal filed in the District Court is reproduced in the Appendix as App. C.

STATEMENT OF JURISDICTON

The United States Court if Appeals for the Eleventh Circuit issued its order denying the certificate of appealability on April 11, 2007 and Petitioner has met the exhaustion of remedies requirement by raising the identical claim of ineffective assistance of appellate counsel and the manifestations of it in both the State and Federal Courts Picard v Connor, 404 U.S. 270,275; Edwards v Carpenter, 529 U.S. 446, 452-453; Duncan v Henry, 513 U.S. 364, 356-366 as well as by the fact that the State of Florida has never raised an exhaustion claim. Heath v Jones, 941 F. 2d 1126, 1130 n.4 (11th cir 1991)

The State Court petitioner alleged appellate counsel was ineffective under the standard of Strickland v Washington 466 U.S. 684 and deprived of his right to due process of law citing Evits v Lucy 469 U.S. 387 and Jones v Barnes 463 U.S. 745 because of counsel's failure to raise in the Florida Appellate Court three state law issues, to wit: truly inconsistent verdicts, guilt not established beyond a reasonable doubt and failure to charge that speed alone does not constitute reckless driving; and the same, in just about identical language was made in petitioner's statement in support of the writ and counsel's memorandum of law.

Contrary to the holding of District Court, appellant has made but one federal constitutional claim of ineffective assistance of appellate counsel with three manifestations of it. While federal courts have only limited authority to consider state evidentiary rulings (Burgess v Texas 389 U.S. 10-, 112-114) the merits of petitioner's federal constitutional claim of ineffective appellate counsel requires consideration of the issues that counsel failed to raise on appeal (see, e.g., Smith v Page, 01 WL936126 (N.D.I11) to determine the substance of the federal claim. But as the manifestations of ineffective assistance of appellate counsel relate to a failure to raise preserved legal issues the presumption given to the correctness of factual determinations in the state court is not involved. See, Herring v Sec Dept Corrections, 397 F.3d 1338, 1342 (11th cir 2005); Parker v Head, 244 F.3d 831 (11th cir 2001)

Put another way, it is the fact that counsel failed to raise certain state law issues that give rise to the federal ineffective assistance claim so that the issue is whether counsel was deficient in not raising them, not whether the state law claims are themselves federal constitutional issues.

All in all petitioner has properly raised the federal issue of the ineffective counsel in both state and federal court (see, Judd v Haley, 250 F.3d 1308 (11th cir 2001); see, also Howard v Kemma, 06 WL 3538801 (E.D. Mo.)

STATEMENT OF CASE

Petitioner was convicted after a jury trial in the Circuit Court of Pasco County Florida of three counts of vehicular homicide, two counts of reckless driving causing serious injury, and one count of reckless driving and was sentenced to a total term of 35 years imprisonment. Petitioner is incarcerated under the judgment of conviction.

The conviction was affirmed on appeal without opinion in the Florida Second District Court of Appeals (907 So.2d 525 (2005)) and thereafter, and again without opinion, that same court denied his application to vacate the judgment on grounds of ineffective assistance of appellate counsel. 935 So.2d 6 (7/20/06). Subsequently, on the identical grounds as raised in the State Court on his motion to vacate the judgment, petitioner, timely but unsuccessfully, moved for relief under 28 U.S.C. sec 2254 in the District Court of the Middle District of Florida. The District Court denied an application for a certificate of appealability (App. B.) as did the United States Court of Appeals for the Eleventh Circuit. (App. A.)

THE CASE AND STATE PROCEEDINGS
FACTUAL BACKGROUND

On March 2, 2001, petitioner was involved in what should have been treated as a terrible and tragic automobile accident. On the above date, while driving eastbound on Road 54 near Rowan Rd., in Pasco County Florida, petitioner with his wife sitting beside him, came to a stop at a red light. According to the State, when the light turned green, a Corvette automobile which had also stopped at the red light and petitioner sped off. Whatever claim that this was a race was quickly dissipated because while petitioner continued on Road 54 the Corvette turned off and was never located. Though the Corvette was now gone petitioner continued and while entering a turn lost control of the car and skidded into the westbound lane of Road 54 and his car and an oncoming vehicle in the westbound lane collided killing and injuring several of the occupants in the westbound car as well as petitioner's wife who was sitting in his car. It was stipulated at the trial, however, that the collision was the single cause of all the deaths (trial transcript p 134 App. F.)

The State also offered proof as to petitioner's speed both before and at the time of impact but that proof was no more than the surmise of its expert who testified he did not know the speed of the oncoming car in the westbound lane which was crucial for his calculation of petitioner's speed and just guessed that the oncoming driver was going at the speed limit which was 45 miles per hour.

REASONS FOR GRANTING THE PETITITON

The Court of Appeals for the Eleventh Circuit in denying the application for a Certificate of Appealability and dismissing the appeal did not properly follow the Court's standards as set forth in *Miller-el v Cockrell*, 537 U.S. 322 (2003) and *Slack v McDaniel*, 529 U.S. 473, 484 (2000) in holding that petitioner did not make a "... substantial showing of the denial of a constitutional right. 28 U.S.C. sec. 2235 (c)" or that reasonable jurists would not differ.

The constitutional claim asserted in the Petition For Relief at the District Court was that petitioner was represented by ineffective counsel on appeal.

ERROR NOT TO GRANT CERTIFICATE OF APPEAL ABILITY

Even before *Miller-el*, supra the standard for a certificate of probable cause or certificate of appealability was that petitioner merely presents a colorable claim of a constitutional error. (*United States v Cepero*, 224 F.3d 256, 263 (3rd Cir. 2000) citing *Barefoot v Estelle*, 463 U.S. 880) that is not plainly frivolous (*Gardner v Pogue*, 558 F.2d 249 (9th Cir. 1961)). *Gardner, supra* is very instructive because it indicates the difference between "not frivolous" and "substantial" is one of art subject to subtle analysis though basically both have the same meaning and in terms of the standard to be applied they mean nothing more than something higher than the good faith requirement in a forma pauperies application. For, as the Seventh Circuit held, the purpose of the Certificate of Appealability is merely to screen out clearly unmeritorious appeals *Buie v McAdory*, 332 F.3d 980 (7th Cir. 2003).

In fact petitioner need not even show he would prevail on the merits because he has already failed. All that has to be shown is that a Court could resolve the issue in a matter different from that of the District Court *United States ex rel. Escobar v. Gilmore*, 1989 WL 6154 (N.D. Ill. 1989). As long as the petition is not merely conclusory (see *Wallace v Clason*, 2003 WL 1798943 (D.C. Cir. 2003) the inability to show an ultimate entitlement to the relief sought in the petition does not bar the issuance of the certificate of appealability. *Miller-el v Cockrell, supra; Slack v McDaniel, supra; Barefoot v Estelle, supra* at 893, which is a separate proceeding distinct from the underlying merits of the petition. *Miller-el* citing *Slack, supra* at 481.

Any fair reading of petitioner's claim, leads to the conclusion that the Eleventh Circuit applied an impermissible standard, contrary to *Miller-el* and *Slack* that considered entitlement to the ultimate relief rather than examining the petition as a proceeding distinct from the underlying merits of the application.

Miller-el clearly held that petitioner need not show he was entitled to the ultimate relief but only that reasonable jurists would find the District Court's assessment of the constitutional claim to be either debatable or wrong – and debatable does not require that the jurists eventually agree with petitioner's contentions. See also *Slack v McDaniel, supra.*

Applying *Miller-el* and *Slack* which really only clarified and restated existing law, it was at least debatable that petitioner was represented by ineffective counsel.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

As indicated, the State's case was that instead of being a tragic accident petitioner while waiting at a red light sped and raced off with another car when the light turned green, that the other car turned off but petitioner continued into a turn and lost control, that petitioner then skidded into the lane of oncoming traffic and collided with another car injuring and killing several occupants therein as well as causing the death of petitioner's wife who was sitting alongside of him.

The failure of appellate counsel to raise in State Court the preserved issues of truly inconsistent verdicts and that defendant's guilt was not established beyond a reasonable doubt and that it was error not to charge the special instruction that speed alone does not constitute reckless driving, as requested, constitutes ineffective assistance of appellate counsel under the standard of Strickland v Washington, 466 U.S. 684 for effective assistance of counsel at trial (Smith v Robbins, 528 U.S. 249, 287-289; see, Heath v Jones, 941 F.2d 1126, 1130 (11th cir 1991); Halsey v Crosby, 05 WL 1051236 (MD Fla. 2005)) and was a deprivation of petitioner's right to due process of law. Evits v Lucy 469 U.S. 387; Jones v Barnes, 463 U.S. 745; see, also, Alvord v Wainwright, 722 F.2d 1282 (11th cir 1984)

At the State Court petitioner's conviction was affirmed without opinion on a brief (App. E.) which raised but one point, but in the context of this case the selection of that one issue (a discovery violation) to the exclusion of

others which went to the heart of the case against petitioner was just insufficient to redeem the performance of appellate counsel and cannot be explained by any reasonable strategy to benefit appellant (see *Pavel v Hollins*, 261 F.3d 210, 218 (2nd cir 2001) of "winnowing" the points down. See, Heath v Jones, supra at 1131-1132; see, also, Zamora v Dugger, 834 F.2d 956 (11th cir 1987); Chu Young Yi v Gearinger, 139 F.Supp, 2d 1393 (ND Ga. 2001)

Indeed, even a casual glance at the brief prepared at the State Appellate court shows there was no reason to limit the brief to one argument and in considering the one argument raised which had a harmless error analysis there was none of the required winnowing of weaker arguments in favor of a single strong or strongest argument. See, Yarborough v Gentry, 540 U.S. 1; see, also, Greer v Mitchell, 264 F.3d 663 (6th cir 2001)

As will be shown the errors of appellate counsel in not raising the issues mentioned are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of acceptable professional performance and compromised the appellate process by undermining confidence in the correctness of the result of the court which means petitioner has satisfied the Strickland test that counsel's performance be deficient and that he be prejudiced thereby. Smith v Robbins, supra; Nebel v Sec. Dept of Corrections, 06WL 709330 (MD Fla. 2006); Hayes v Culliver, 05WL 1270450 (MD Fla. 2005) – and, of course, prejudice means only that the neglected claims had a reasonable probability of success and effected the outcome of the case. Smith v Robbins, supra; Cross v United States, 893 F.2d 1287, 1290 (11th cir 1990); Dabbs v Crosby, 05WL

2456220 (MD Fla. 2005); Sobin v Moore, 00WL 1262850 (MD Fla. 2000).

TRUE INCONSISTENT VERDICT

Though preserved for review appellate counsel failed to raise in the State Court and under State law the claim that there was a true inconsistent verdict in finding petitioner guilty of reckless driving as a lesser of vehicular homicide for the death of his wife and vehicular homicide for the death of other persons in the accident despite the fact that the crash of automobiles was the causative factor of all of the deaths (stipulation of parties, transcript page 134 App. F.)

Based on the fact that the single crash caused all of the deaths it follows under Florida law that petitioner's single fault in causing the crash was the same for each death so that while multiple convictions can be had from a single episode (see, Bautistau v State, 863 So.2d 1180 (Fla. 2003); McKnight v State, 906 So.2d 868 (5 DCA 2005); Duckett v State, 696 So.2d 662, 553 (2 DCA 1996) the reckless conviction for the death of petitioner's wife negated a necessary element to find defendant guilty of vehicular homicide with regard to the other deaths. State v Cappalo, So2d (2DCA 2/15/06); Cf., Peterson v State, 775 So.2d 376, 377-378 (4 DCA 2000); Gonzales v State, 440 So.2d 514, 515 (4DCA 1983). In order to convict of vehicular homicide under Florida law there has to be a reckless operation of an automobile which was the proximate cause of death. Velazquez v State, 561 So.2d 347 (3 DCA 1990); M.C.J. v State, 444 So.2d 1001 (1 DCA 1984) In a single episode where there is, by definition, one causation of all deaths, it is truly inconsistent to find the proximate cause of some of the

deaths was by the reckless operation of an automobile but not all of them.

No doubt an inconsistent verdict which could have resulted from lenity on the part of the jury, as argued by the prosecution in the trial court in opposition to the motion, is permissible. State v Powell, 674 So. 2d 731, 732-733 (Fla. 1996); but when the verdicts, as here, relate to legally interlocking charges they are truly inconsistent and impermissible. State v Cappalo, supra It is also clear a different standard applies when the verdict is not one of purported leniency. In the present case an acceptable verdict would have been reckless driving so that the verdict of vehicular homicide was an expression of increased severity on the part of the jury to reflect the death of strangers in the oncoming car.

As the jury was bound by the stipulation as to the cause of death we cannot suppose they ignored their duty on some supposed claim of leniency towards petitioner's wife, as suggested by the 11th Circuit in denying the Certificate of Appealibility. Indeed, any claim of leniency is really pure speculation because it could just as easily be argued that the jury impermissibly found petitioner guilty of the vehicular homicide counts, as indicated above, because they treated the deaths of strangers in the other car more severely than the death of petitioner's wife in his own car. In any event, even without the stipulation of cause of death the State's proof was of a single episode with many victims all with the same elements so that the jury's verdict was one of confusion including the possibility of severity not leniency as urged by the prosecutor in response to counsel's motion with regard to the true inconsistent verdict.

No stratagem, tactic or other explanation comes to mind to justify or explain counsel's failure to raise the preserved issue of a truly inconsistent verdict except that there was a lack of preparation, oversight or unfamiliarity with the law and facts: all of which constitute ineffective assistance. It is not, therefore, second guessing (See, Zamora v Dugger, supra) to urge that counsel, who failed to raise preserved issues that went to the heart of petitioner's case, as here, provided ineffective assistance on the appeal. See, Nebel, supra

GUILT NOT ESTABLISHED BEYOND A REASONABLE DOUBT

Though preserved for the State Appellate Court by trial counsel's motion for a new trial, appellate counsel failed to raise the issue on appeal that the verdict was contrary to law or the weight of the evidence.

The basis of the state's case against petitioner was that he was racing and speeding in his car. First off, speeding by itself is insufficient to convict for vehicular homicide. D.E. v State, 904 So. 2d 558, 562 (5 DCA 2005) House v State, 831 So. 2d 1230 (2DCA 2002); Miller v State, 636 So.2d 144 (1DCA 1994); State v DelRio, 854 So.2d 692 (2DCA 1983); Hamilton v State, 429 So.2d 238 (2DCA 1983); see also, State v Gensler, So.2d (2DCA 4/5/06) speed plus disregarding traffic signal). And, in any event the evidence did not establish that petitioner was speeding. An engineer testified for the State that petitioner was going 88.5 miles per hour before the impact and 62.2 at the point of collision (trial 284 App. F.) This purported scientific determination was, however, only a guess. As the

engineer testified, his determination required him to know the speed of the other car at the time of impact. He guessed it to be 45 miles per hour (the speed limit) because the driver of the other car could remember nothing about the accident including her speed (trial 88, App. F.) The engineer testified that every 10 miles per hour driven by the oncoming car over or below the speed limit caused a 6 mile per hour increase or decrease in petitioner's speed at the time of impact (trial 317 App. F.) Thus, if instead of going 45 miles per hour the other driver saw petitioner's oncoming car and tapped her breaks slowing herself down without leaving any skid marks she might have been going around 25 or 30 miles per hour at the time of impact which would mean petitioner was going around 50 miles per hour at that time. This is, of course, mere speculation, but so is the purported scientific determination of the engineer because without the speed of the other car all he could do was guess.

A Mr and Mrs Cline testified about the distance between themselves and petitioner and the corvette but if what they said about the distance between themselves and the two cars is incorrect they have to be wrong as to the speed of the petitioner's car (trial 324 App. F.) All in all, though speed by itself is insufficient to convict for vehicular homicide it was nevertheless never established beyond a reasonable doubt in the present case.

It is also clear that as speed alone is insufficient to constitute reckless driving it was error to refuse petitioner's request for a special instruction of that fact for if the jury concluded there was no race it could not find vehicular homicide for failure to establish the elements of the crime. In the opinion at the 11th circuit denying the certificate of appealability the court correctly held, inter alia, a defendant

was entitled to the special jury instruction only if the instruction was a correct statement of the law, see, Stephens v State, 787 So.2d 747, 756 (Fla. 2001). The court continued that while the requested jury charge was the law in some Florida Appellate Courts citing House v State, 831 So.2d 1230 it failed to recognize the House decision was from the Second District Court of Appeals, the very same Florida Appellate Court that petitioner's case arose from. Under the circumstances the Pasco County trial judge was bound by the House case and by not giving the charge allowed the jury to be confused, as its verdict shows, as to the claimed race by the prosecution. Indeed, the failure to give the requested charge also impacted on the truly inconsistent nature of the verdict because the jury was left with the improper option of considering different causes of death even though there was a stipulation that there was only one cause of death. Despite the preservation of the issue on appeal appellate counsel raised no issue or argument on this score even though she recognized in her statement of facts that the petitioner had made a request for the charge.

As for a race any such conclusion would also be against the weight of the evidence. The Clines testified petitioner and a corvette drove out when the light turned green but that the corvette turned off on to old route 54 while petitioner continued into the turn in the road when they lost sight of him. Speed plus a race is sufficient under Florida to convict for vehicular homicide Velazquez v State, 561 So.2d 347 (3DCA 1990). But, in the present case any race, if there was one, ended when the corvette turned off the roadway leaving petitioner to continue on by himself. Thus, when he entered the turn, even if he were speeding, he was doing so alone and not as part of a race with anyone; all of which means that at the time petitioner lost control of his car there

was no race or any other additional factor to warrant a conviction for vehicular homicide under Florida law.

Meritorious claims, therefore, which would have affected the outcome of petitioner's appeal before the Florida Second District Court of Appeals existed but were not raised by appellate counsel, even though preserved for review in the State Appellate Court, causing petitioner to be derived of effective assistance of counsel in that court. The petitioner's prayer for relief should, therefore, be granted.

CONCLUSION

For the foregoing reasons the Writ of Certiorari should be granted.

Respectfully submitted,

_____

Matthew Muraskin

Attorney for Petitioner

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NICHOLAS DeMERIE,

Petitioner,

v. Case No. 8:06-cv-1121-T-26TGW

SECRETARY, Department Of Corrections,

Respondent.

ORDER

DeMerie's petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenges the validity of his state convictions for (1) three counts of vehicular homicide, (2) two counts of reckless driving causing serious injury, and (3) one count of reckless driving, for which he was sentenced to a total of thirty-five (35) years. This action is proceeding based on the amended petition for the writ of habeas corpus (Dkt. 9) and the response (Dkt. 15), which is supported by numerous exhibits ("Respondent's Exhibit"). The respondent admits that the petition is timely (Dkt. 15 at 3, fn.4). Having considered the arguments of the parties and reviewed the record, this court concludes that the petition is meritless.

STATE PROCEEDINGS

On March 2, 2001, DeMerie entered into a "street race" going eastbound on State Road 54 near Rowan Road in Pasco County. DeMerie and his wife were in their Camaro when they started to race against a Corvette. DeMerie lost control of his Camaro on a curve and slid into a vehicle

traveling westbound on State Road 54. The collision resulted in the deaths of DeMerie's wife and three of the occupants in the other vehicle and caused serious bodily injury to the remaining two occupants in the other vehicle. Eyewitnesses testified that DeMerie had accelerated his Camaro to around 80 - 90 miles per hour (mph). The state's expert witness estimated the speed of DeMerie's vehicle at 88 mph prior to impact and *62* mph at impact. The jury convicted DeMerie of vehicular homicide for the three deaths in the other vehicle and reckless driving involving serious bodily injury for the injuries sustained by the remaining two occupants in the other vehicle. The jury convicted DeMerie of the lesser included offense of reckless driving for the death of his wife/passenger. DeMerie was sentenced to concurrent terms of 35 years imprisonment.

The conviction and sentence were affirmed on direct appeal (Respondent's Exhibit 4). DeMerie did not challenge his conviction in a state Rule 3.850 motion for post-conviction relief. However, DeMerie did challenge his conviction in a state petition for the writ of habeas corpus (Respondent's Exhibit 6) filed with the state district court of appeal in which he alleged that his appellate counsel was ineffective for failing to raise three specific claims of error. The petition was denied (Respondent's Exhibit 7). DeMerie then commenced the instant federal action in which the only grounds asserted are the same three claims of ineffective assistance of appellate counsel that he raised in the state collateral proceeding.

EXHAUSTION

To meet the exhaustion requirement, DeMerie must present his claims to the state courts before raising them in federal court, and the claims raised in the federal court must be the same claims presented to the state courts. *Picard v.*

Connor, 404, U.S. 270, 275 (1971) (observing that "[w]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."); *Rose v. Lundy,* 455 U.S. 509, 518-19 (1982) (stating that "[a] rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error."). "Mere similarity of claims is insufficient to exhaust." *Duncan v. Henry,* 513 U.S. 364, 366 (1995). Additionally, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless,* 459 U.S. 4, 6 (1982). The reverse of this statement is likewise true, that is, it is not enough to present the federal claim to the state courts but not the facts necessary to support the claim. *See, e.g., Brown v. Estelle,* 701 F.2d 494, 495 (5th Cir. 1983) (noting that "[t]he exhaustion requirement is not satisfied if a petitioner presents new legal theories or entirely new factual claims in support of the writ before the federal court,").

Although DeMerie presented his three claims of ineffective assistance of appellate counsel to the state district court of appeal, he failed to present the claims as federal constitutional claims. DeMerie's state petition (Respondent's Exhibit 6) relies solely on state law and fails to assert that his federal constitutional rights were violated. Briefing an issue as a matter of state law is not sufficient to exhaust a federal claim on the same grounds.

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an

> evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66 (1995). Consequently, DeMerie's claims are unexhausted and not properly before this court for review. Nevertheless, even if properly exhausted, the claims are without merit.[1]

STANDARD OF REVIEW

This action is governed by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Wilcax v. Florida Dep't of Corrections,* 158 F.3d 1209, 1210 (11th Cir. 1998), *cert. denied,* 531 U.S. 840 (2000). Section 2254(d) creates a highly deferential standard for federal court review of state court adjudications. Section 2254(d) states in pertinent part that

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

[1] Because the state does not oppose the petition based on a lack of exhaustion, the court will proceed with a discussion of the claims of ineffective assistance of appellate counsel.

> established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Williams v. *Taylor,* 529 U.S. 362, 412-13 (2000), elaborates this deferential standard:

> In sum, §2254(d)(l) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(l), the writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal Law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state

> court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Moreover, "[t]he focus ... is on whether the state court's application of clearly established federal law is objectively unreasonable,... an unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 694 (2002); accord Brown v. Head, 272 F.3d 1308, 1313 (11th Cir. 2001) (stating that "[i]t is the objective reasonableness, not the correctness per se, of the state court decision that we are to decide.")

DeMerie's convictions and sentences was affirmed *per curiam* without an opinion (Respondent's Exhibit 4). Similarly, DeMerie's state petition for writ of habeas corpus was denied *per curiam* without an opinion. The state appellate court's per curiam decisions merit deference under Section 2254(d)(1), because "the summary nature of a state court's decision does not lessen the deference that it is due." *Wright v. Moore*, 278F.3d 1245, 1254 (11th Cir.), *reh'g and reh'g en banc denied*, 278 F.3d 1245 (2002), *cert. denied sub nom Wright v. Crosby*, 538 U.S. 906 (2003).

DeMerie has the burden of overcoming all state-court factual determinations by clear and convincing evidence. [A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This presumption of correctness applies only to findings of fact, not mixed determinations of law and fact. *Parker v. Head*, 244 F.3d 831 (11th Cir.), *cert denied*, 534 U.S. 1046 (2001). However, because DeMerie's conviction and sentence were affirmed on direct appeal without a written analysis, and the

state petition for writ of habeas corpus was denied without a written analysis, there are no findings of fact to which this Court can defer regarding DeMerie's claims of ineffective assistance of appellate counsel.

As stated above, DeMerie must prove that the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) ... based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

INEFFECTIVE ASSISTANCE OF COUNSEL

DeMerie claims ineffective assistance of counsel, a difficult claim to sustain. "[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between," *Waters v. Thomas, 46* F.3d 1506, 1511 (11th Cir. 1995) *(en banc)* (quoting *Rogers v. Zant,* 13 F.3d 384, 386 (11th Cir. 1994)). *Strickland v. Washington,* 466 U.S. 668 (1984), governs an ineffective assistance of counsel claim. As explained by the Eleventh Circuit Court of Appeals,

> The law regarding ineffective assistance of counsel claims is well settled and well documented. In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set forth a two-part test for analyzing ineffective assistance of counsel claims. According to *Strickland,* first, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

> "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. *Sims v. Singletary,* 155 F.3d 1297,1305 (llth Cir. 1998).

Strickland requires proof of both deficient performance and consequent prejudice. *Strickland, 466* U.S. at 697 (observing that "[t]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."); *Sims,* 155 F.3d at 1305 (noting that "[w]hen applying *Strickland,* we are free to dispose of ineffectiveness claims on either of its two grounds."). "[Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland,* 466 U.S. at 690. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" Id. *Strickland* requires that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

Because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment," DeMerie must demonstrate that any alleged error by counsel prejudiced the defense. *Strickland,* 466 U.S. at 691-92. To meet this burden, DeMerie must show "a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

Strickland cautions that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 690-91. DeMerie cannot meet the burden *of Strickland by* showing that, in hindsight, the avenue chosen by counsel proved ineffective.

> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218,1220-21 (llth Cir. 1992); *accord Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir. 2000) ("To state the obvious: the trial lawyer, in every case, could have done something more or something different. So, omissions are inevitable.... [T]he issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' ") *(en banc)* (quoting *Burger* v. *Kemp,* 483 U.S. 776, 794 (1987)); *see also Jones v. Barnes,* 463 U.S. 745, 751 (1983) (counsel has no duty to raise frivolous claims).

The *Strickland* standard for determining ineffective assistance of trial counsel applies equally to claims of ineffective assistance of appellate counsel. The deficient performance prong is not established simply because appellate counsel did not raise a particular issue on appeal. Counsel need not raise every nonfrivolous issue on appeal. *Jones v. Barnes,* 463 U.S. 745 (1983). Indeed, the process of winnowing out weaker claims on appeal and focusing on those more likely to prevail is the hallmark of effective appellate advocacy. *Accord Atkins* v. *Dugger,* 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

DeMerie's appellate counsel raised one claim on direct appeal: whether the trial court erred by refusing to conduct a *Richardson* inquiry after a key prosecution witness testified concerning photographs which were undisclosed to the defense prior to trial (Respondent's Exhibit 2). DeMerie argues that appellate counsel was ineffective for failing to also raise the following three claims: (1) inconsistent verdicts,[2] (2) the verdicts were against the weight of the evidence, and (3) the trial court erred in rejecting a jury charge that speeding alone does not equal reckless driving. Although couched in terms of the denial of a federal right, each claim is based solely on state law. DeMerie does not cite any federal case authority to the contrary. DeMerie has not shown that appellate counsel's performance was deficient

[2] The jury convicted DeMerie of vehicular homicide for the deaths of three occupants of the other vehicle. DeMerie's wife/passenger was also killed during the accident, but the jury convicted him of only reckless driving regarding her death. He contends that those verdicts are inconsistent.

for raising the one chosen claim rather than the three claims DeMerie contends should have been raised. None of the three claims are of such merit that the outcome of the appeal would have been different. Speculation is an insufficient basis to show prejudice.

ACCORDINGLY, it is **ORDERED AND ADJUDGED** that the petition for writ of habeas corpus is **DENIED.** The clerk shall enter a judgment against DeMerie and **CLOSE** this action.

DONE AND ORDERED in Tampa, Florida, on January 10, 2007.

s/RichardA. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

SA/ro

U.S. District Court
Middle District of Florida

Notice of Electronic Filing

The following transaction was entered on 2/13/2007 at 10:33 AM EST and filed on 2/13/2007

Case Name: DeMarie v. Secretary, DOC et al
Case Number: 8:06-cv-1121
Filer:
WARNING: CASE CLOSED on 01/11/2007
Document Number: 24 (No document attached)

Docket Text:
ENDORSED ORDER denying [22} Motion for certificate of appealability because Petitioner has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. section 2253(c)(2). Signed by Judge Richard A. Lazzara on 2/13/2007. (Hartman, S.)

8:06-cv-1121 Notice has been electronically mailed to:
Patricia Ann McCarthy patricia_mccarthy@oag.state.fl.us, Juanita_White@oag.state.fl.us

8:06-cv-1121 Notice has been delivered by other means to:
Jacqueline Jorgensen
1406 South Parsons Avenue., Suite B
Seffner, FL 33584-4502

Matthew Muraskin
Law Office of Seth Muraskin
1772 Jericho Turnpike East, Suite 2
Huntington, NY 11743

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NICHOLAS DEMERIE,

PETITIONER,

-AGAINST-

SECRETARY, DEPT OF CORRECTIONS,

RESPONDENT.

NOTICE OF APPEAL
8:06 CV1121 T26TGW

SIRS:

PLEASE TAKE NOTICE, that the above named NICHOLAS DEMERIE, herein appeals to the United States Court of Appeals for the Eleventh Circuit from the memorandum and order of this Court (Lazzara, J.) entered in the office of the clerk on January 10, 2007 denying without a hearing petitioner's application for relief under 28 USC sec 2254 and from each and every part of said order.

Yours etc.
Matthew Muraskin
Attorney for petitioner
1772 East Jericho Tpke
Huntington, NY 11743
631 423-9400

Dated: Huntington, New York
January 17, 2007

To: Charles J. Crist, Jr., Fla Attorney General
Concourse Center #4
3507 East Frontage Rd. Suite 200
Tampa, Fla, 33607
Clerk, District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-10662-I

NICHOLAS DEMERIE,

Petitioner-Appellant,

versus
SECRETARY, DEPARTMENT OF CORRECTIONS,
FL ATTORNEY GENERAL,
Respondents-Appellees.

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Appellant seeks a certificate of appealability, as construed from the notice of appeal, to appeal the denial of his 28 U.S.C. § 2254 petition. In his § 2254 petition, appellant claimed that his appellate counsel was ineffective for failing to argue on appeal that (1) the verdict was inconsistent, (2) the verdict was contrary to law and against the weight of the evidence, and (3) the trial court erred in refusing to give the requested jury charge that speeding alone does not constitute reckless driving. In order to obtain a certificate of appealability a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

A defendant claiming ineffective assistance of counsel must demonstrate both professional error and prejudice to the outcome of the proceedings, and the failure

to demonstrate either is dispositive of the claim against the petitioner. Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984). In determining whether counsel gave adequate assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S.Ct. at 2066. Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. Id. at 688, 104 S.Ct. at 2065. Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694,104 S.Ct. at 2068. The standard in Strickland governs ineffective-assistance-of-appellate-counsel claims as well. Clark v. Crosby, 335 F.3d 1303,1310 (11th Cir. 2003). Appellate counsel is not required to present every claim - frivolous or non-frivolous - but is expected to present only those that, in counsel's professional judgment, would be most likely to result in a decision favorable to the appellant. See Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000) (holding that appellate counsel need not present every non-frivolous claim, but, rather, should screen the possible claims and present those that are likely to "maximize the likelihood of success on appeal"): Jones v. Barnes, 463 U.S. 745, 751-52.103 S.Ct. 3308.3312-13.77 L.Ed.2d 987 (1983) (holding that appellate counsel need not brief every non-frivolous issue).

In his first claim, appellant asserted that his appellate counsel was ineffective for failing to argue on appeal that the jury's verdict finding him guilty of reckless driving with respect to the death of his wife and guilty of vehicular homicide as to the deaths of the three victims in the other car was inconsistent because the automobile crash was the cause of all of the deaths. Vehicular homicide is "the killing of a human being . . . caused by the operation of a motor vehicle

by another in a reckless manner likely to cause the death of, or great bodily harm to, another." Fla. Stat. § 782.071. Reckless driving is the driving of a vehicle "in willful or wanton disregard for the safety of persons or property." Fla. Stat. § 316.192.

Inconsistent verdicts generally are permitted in Florida because they may "be the result of lenity and therefore do not always speak to the guilt or innocence of the defendant." State v. Powell, 674 So.2d 731, 732 (Fla. 1996). The exception to this rule is when the verdicts are "legally" inconsistent, i.e., when the charges against the defendant are legally interlocking and the verdicts are "truly inconsistent." Id. at 733. This occurs when an acquittal on one count negates a necessary element for conviction on another count, such as a guilty verdict on a felony murder charge but a not guilty verdict on the underlying felony charge. See id.

While the jury's verdict finding the appellant guilty of vehicular homicide as to the death of the three individuals in the other vehicle and only reckless driving with respect to the death of appellant's wife may have been factually inconsistent, it does not fall within the "legally inconsistent" verdict exception under Florida law. The conviction on the lesser offense of reckless driving does not negate any necessary element of the greater charge of vehicular manslaughter. The jury's decision here to convict the appellant of only reckless driving could reflect a desire to show lenity or mercy. See Naumowicz v. State, 562 So.2d 710, 713 (Fla. Dist. Ct. App. 1990) (holding that a verdict convicting the defendant of DUI manslaughter as to the death of the passenger of her vehicle, but acquitting defendant of the death of the person driving the other vehicle in the accident, who also was intoxicated, was not legally inconsistent). Because appellant has not shown that reasonable jurists would find debatable whether the district court erred in finding that appellate counsel was not ineffective for failing to raise this claim on appeal, the

appellant is not entitled to a COA as to this claim.

In his second claim, appellant argued that his appellate counsel was ineffective for failing to argue on appeal that the verdict was contrary to law or against the weight of the evidence. "For a verdict to be against the manifest weight of the evidence, so as to warrant a new trial, the evidence must be clear, obvious, and indisputable; where there is conflicting evidence, the weight to be given that evidence is within the province of the jury." Harlan Bakeries, Inc. v. Snow, 884 So.2d 336,340 (Fla. Dist. Ct. App. 2004). The state presented evidence that supported a reasonable inference that the appellant engaged in a race with another vehicle and was driving at an estimated speed of more than 80 miles-per-hour on a road with a posted speed limit of 45 miles-per-hour when appellant lost control of his vehicle and collided with another vehicle, killing three people and injuring two others in that other vehicle. These facts would permit a reasonable jury to conclude that the appellant caused the death of the three victims in the other vehicle by operating his vehicle in a reckless manner likely to cause death or serious bodily injury to another. Fla. Stat. § 782.071. Because there was substantial evidence to support the vehicular homicide convictions, reasonable jurists would not find debatable whether the district court erred in finding that appellate counsel was not ineffective for failing to raise this claim on appeal. Thus, the appellant is not entitled to a COA as to this claim.

In his third claim, the appellant argued that appellate counsel was ineffective for failing to argue on appeal that the trial court in denying the proposed jury instruction that speed alone was insufficient to constitute reckless driving. Florida appellate courts review a trial court's decision to withhold a proposed jury instruction for an abuse of discretion. Aumuller v. State, 944 So.2d 1137, 1142 (Fla. Dist. Ct. App. 2006). Standard jury instructions are presumed correct and preferred over special instructions. Stephens v. State, 787

So.2d 747, 755 (Fla. 2001) "In order to be entitled to a special jury instruction, a defendant must prove that the special instruction was supported by the evidence, was a correct statement of the law and was not confusing or misleading, and the standard instruction did not adequately cover the theory of defense." Id. at 756. The trial court gave the standard jury instruction on vehicular homicide and defined the terms "reckless manner," "willful," and "wanton." While the requested special jury instruction reflects the law in some Florida appellate courts, see, e.g., House v. State, 831 So.2d 1230 (Fla. Dist. Ct. App. 2002), the trial court denied the requested instruction because it was concerned that the jury would be confused as to how to weigh the significance of the race in this case. Because of the potential that this instruction would be confusing and in light of the otherwise complete jury instruction, appellate counsel had no reasonable probability of showing on appeal that the trial court abused its discretion in denying the requested special instruction. Thus, because reasonable jurists would not find debatable whether the district court erred in finding that appellate counsel was not ineffective for failing to raise this claim on appeal, the appellant is not entitled to a COA on this issue.

Accordingly, appellant's motion for a certificate of appealability, as construed from the notice of appeal, is DENIED because appellant has failed to make the requisite showing. See 28 U.S.C. § 2253(c)(2).

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT STATE OF FLORIDA

NICHOLAS DEMERIE, JR.,

Appellant,

vs.

CASE NO. 2D04-1735

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY

INITIAL BRIEF OF APPELLANT

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COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

On March 2, 2001, Appellant, Nicholas Demeric, Jr., was involved in an automobile accident that resulted in the deaths of his wife and three other individuals and in the physical injuries of two others (R 12-13). [3] On March 22, 2002, Appellant was charged by information with the offenses of Vehicular homicide (counts I through IV) and reckless driving with serious bodily injury (counts V and VI) (R 32-34).

Appellant proceeded to trial before the Honorable Daniel D. Diskey on January 20-22, 2004 (T 1-531). Randy Cline testified that he and his wife and child were headed to Wal-Mart on State Road 54 at approximately 8:00 p.m. on March 2, 2001 (T 30-32). While stopped at a red light at the intersection of Rowan Road and State Road 54, Cline noticed a Camaro containing an older gentleman driver and a female passenger in the lane to his right (T 32-33). When the light turned green, both vehicles accelerated fairly rapidly (T34).

Suddenly, a red Corvette passed Cline's vehicle on the right, cut in front of him, and then got right beside the Camaro (T 34-35). When the Corvette and Camaro were side-by-side, they began to pull away from the Cline's vehicle like it was "sitting still" (T 35-38). The two vehicles appeared to remain side-by-side until the tail lights of the Camaro started to swerve around the curve where new 54 intersects with old 54 (T 33-39). Cline estimated that the fastest speed of the Camaro was between 80 and 90 miles per hour (T 41).

When the taillights of the Camaro disappeared, Cline figured it made it around the turn (T 39). The Corvette proceeded onto old 54, but Cline did not see where the Camaro went (T 39). As Cline proceeded around the turn, he

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[3] (R -) refers to the record on appeal by appropriate page numbers(s); (T-) to the transcript of trial by appropriate page numbers(s).

noticed an accident but did not stop (T 40). The following day, Cline saw a newspaper article concerning the accident and recognized a photograph of the Appellant as the driver of the Camaro (T 43). At that time, he contacted the Florida Highway Patrol and provided a taped statement (T 44).

Cline's wife Jamie was a passenger in his vehicle at the time of the accident (T 58). She also observed the Camaro at the red light and the red Corvette cutting in front of them (T 59-60). Further ahead, the Corvette appeared to get in the left lane and the Camaro began to fishtail around the curve (T 61).The Cline's proceeded to Wal-Mart without stopping for an apparent accident at the curve (T 62). The following day, Cline saw a newspaper article and recognized a photograph of the Appellant as the driver of the Camaro (T 63). Along with her husband, she later gave a taped statement to the Florida Highway Patrol (T 63).

Tabitha Brooks had dinner with her niece, Desiree Posey, friend Michelina Zorbas, and Michelina's children, Robert and Anthony, before proceeding to Wal-Mart on the night of the accident (T 76-78). While en route to Blockbuster Video, Michelina was driving, Brooks was in the passenger seat, Robert was in the middle, Desiree was behind Michelina, and Robert was behind Tabitha (T 79). Michelina had instructed everyone to buckle their seatbelts, but Brooks buckled hers and then unbuckled it (T 80). As the Zorbas vehicle was headed down 54, they were involved in an accident (T 80). Brooks was flown to a hospital by helicopter where she remained for a week and a half (T 82-83). She suffered injuries to her hip, jaw and eye (T 83-85).

Michelina Zorbas remembers nothing about the accident that killed her sons and niece (T 88, 93). As a result of her injuries, Zorbas was hospitalized for approximately five (5) months (T 89-90). She suffered injuries to her feet, ankle, hip, pelvis, kidney, liver, arm and mouth (T 90). Zorbas also experiences migraines and has difficulties with audio, visual, and speech (T 90). She no longer operates a

motor vehicle (T 92).

Gregory Gillham was picking up a puppy along with his wife, friend Christopher Clark, Clark's wife, and their child on the evening of the accident (T 95). While headed west on 54, Gillham heard screeching tires and observed lights sliding sideways toward the left side of the van in which he was traveling as a passenger (T 96-97). After the vehicle narrowly missed the van, Gillham heard a crash (T 98). The van returned to the scene of the accident and waited for help to arrive (T 99).

Pasco County Sheriff's Deputy Frederick Vetter responded to a fire department tone-out from Fire Station 17 located about a mile south of the accident (T 103-104). Upon arriving at the scene, Vetter observed a Camaro and a Chrysler in the westbound lane just east of old 54 (T 106-107). One of the vehicles was on fire (T 107). At that time, the Camaro contained no occupants (T 107). Fire rescue arrived and began working on one of the occupants of the other vehicle (T 108).

Subsequently, Vetter was approached by the driver of the Camaro, who inquired about the condition of his wife (T 108-109). Vetter knew the Appellant because they were neighbors and was aware that the Appellant was an over-the-road truck driver by occupation (R 109-110, 116). At the time of the accident, the speed limit on State Road 54 was forty-five miles per hour (T 113). Vetter observed skid marks in the area where the accident occurred (T 113-114). Vetter asked the Appellant what had happened and Appellant responded that he had been at a car show earlier that evening (T 115). The last thing the Appellant could remember* was being at the intersection of 54 and Rowan Road (T 115). The Appellant did not appear to Vetter to be under the influence of anything (T 119). An objection by the prosecution to a question regarding Vetter's opinion of the Appellant's driving ability was sustained and the jury instructed to disregard the question (T 119-122).

The parties stipulated that the cause of death to the homicide victims was the accident (R 82, 85; T 133-135). Florida Highway Patrolman RJ. Krause responded to the scene as a traffic homicide investigator (T 135-137). Anthony Zorbas was pronounced dead at the scene (T 141). As part of his duties, Krause took photographs at the scene and vehicle impound lot (T 141-168). He also videotaped the vehicles (T 168-169). At the time of the accident, the speed limit was posted eastbound half a mile away from the scene and westbound two-tenths of a mile from the scene (T 171). Krause determined the speed of the Camaro prior to impact to be 86.74 miles per hour (T 172).

Later, Krause interviewed the Appellant on audiotape in the hospital emergency room (T 172-174, 176-184). Appellant did not mention any Corvette in the interview but did admit that he had "floored" the Camaro "a little bit" (T 185, 215-216). Krause checked the Camaro the best he could for defects at the impound lot and nothing seemed out of place (T 185-186). However, the vehicle was severely damaged (T 186). Krause concluded that the Camaro was the vehicle at fault in the accident (T 186). Krause later took statements from the Cline's (T 189). Subsequent to the accident, a traffic light and street lights were installed (T 197-199). The lane markers were also changed after the accident (T 199-200).

Krause owns a Firebird with the same body, engine, suspension, and steering as the Appellant's Camaro (T 208). Both vehicles have positive traction steering, or posi-trac (T 208). Krause has also driven vehicles with posi-track steering while on duty (T 211). Posi-trac steering causes a quicker vehicle response when the wheel is jerked (T 214). If a driver attempts to correct the problem too aggressively, the tires can lose traction causing the back end to come around and the vehicle to go into a slide (T 215).

Some of the notes Krause constructed and utilized to conduct his investigation were discarded or misplaced (T

218-220). Krause utilized a critical speed formula in his reconstruction of the accident (T 221). He was not able to utilize the momentum formula and made a conscious decision not to take the measurements necessary for that calculation (T 221-222, 232). Krause was later contacted by John Murdoch with a request for additional information regarding the distance between critical speed and final rest but was unable to provide the measurement (T 223-224, 228-229). He also learned that he should have taken an additional measurement for the critical speed formula (T 239-240). Krause attempted unsuccessfully to locate the red Corvette (T 226-227). At his direction, blood was drawn from the Appellant (T 227). Appellant did not appear to Krause to be under the influence (T 227-228).

John Murdoch is a self-employed consulting engineer (T 252). In July 2003, at the request of the prosecution, Murdoch conducted his own independent investigation of the accident (T 256-257). Murdoch performed a momentum calculation based upon information that he was able to recreate through his investigation (T 264). In his opinion, the speed of the Camaro was 88.5 miles per hour prior to impact and 62.2 miles per hour at impact (T 284).

Murdoch visited the accident scene in August of 2003 to attempt to do the work without relying on the information compiled by Krause (T 295). After doing his own calculations, Murdoch telephoned Krause to find out where Krause came up with his numbers (T 295-296). One of the VIN numbers from one of the vehicles was even missing a digit (T 296-297).

Murdoch subsequently contacted Krause and informed him that some of his information could not be accurate (T 297). His calculation for the length of the skid marks was approximately 100 feet shorter than Krause's (T 339). Murdoch requested the raw data utilized by Krause but never received it (T 297-298). He disagreed with Krause concerning the inability to utilize the momentum formula at

the scene (T 305). The point of final rest of the vehicles is critical because a change in final rest could change the speed (T 308). The final result is only as good as the parts (T 312).

Murdoch also disagreed with Krause about the point of impact (T 308). If the second vehicle was going faster than the speed limit, it would raise the speed of the Camaro; if the other vehicle was going slower, it would lower the speed of the Camaro at impact (T 315). For every ten miles of speed added or subtracted from the other vehicle, the Camaro's speed is increased or reduced by approximately six miles per hour (T 317). If the testimony by the Clines concerning the distance between their vehicle and the other two vehicles is true, either they are incorrect about the speed of their own vehicle or incorrect about what they observed, including the estimated speed of the Appellant's vehicle (T 324). Murdoch did not bring with him to court photographs that he took at the scene because they were never produced (T 326, 339-340).

When court resumed the following morning, Appellant raised the issue regarding the undisclosed photographs taken by Murdoch (T 344). Defense counsel argued in pertinent part as follows:

> I looked at them [the undisclosed pictures] this morning. And potentially what they are, it's a set of photographs that he evidently did to document the area that he was measuring from.
>
> And I went back last night through the deposition stuff to see, you know, where it was that these came from and everything too.
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> And what he was asked in the deposition was, when you got to the scene, what - tell me everything that you did out at the scene, what did you do. And he went through the things that he had taken, the pictures that he put into evidence yesterday, and was using those against how the lines were on the road to do his measurements; that he had the plan

and profile and he brought that with him for the depo, which was a piece of paper size, the plan and profile that he used to put his markings on and outline everything in that he had done. And then he made his measurements from there.

At the end of the deposition, we then discussed needing to get everything that he had and that he used. And he tells us on the record that, in fact, I will. And I said, I need a set of the pictures that you used. And he said, I will. And he sent all of those [the Krause photographs] to us.

And all the pictures that I got were the pictures that were actually Corporal Krause's pictures, copy of the plan and profile, and a copy of all of the measurements and everything that he did and all the calculations with his little vectors and all that. I got several pages of that as well.

But we never got any other photos that he had done. And never does he state in the deposition that he took photographs of his own at any time.

And so it would be our position that at this point to then say, well, gees, I have them. Oh, yeah, and I can bring them up tomorrow, is a discovery violation at this point that we were not aware of those pictures as they existed. They weren't offered to us at any time, and now we're at the end of the trial and we're going to essentially –

(T 344-346).

Following arguments by counsel, the court declined to conduct a Richardson inquiry based upon its determination

that no discovery violation had occurred and that defense counsel had "opened the door" to admission of the undisclosed photographs (T 344-350). Defense counsel then argued that "the only reason the door was opened, because they were not disclosed to us earlier by the expert when he gave his statement in deposition" (T 348). According to defense counsel:

> This situation is similar to, let's say, just I'll use the analogy, a DUI trial. The arresting officer never mentioning there's a videotape of what he's testifying to. And a defense attorney in cross-examination talking about, well, you know, you don't have a videotape. It happens all the time. And then him saying, yeah, sure I do, I just never told anybody about it. That's the same situation that we have here. You know, different set of facts, but the same type of thing.
>
> You're asking a question because you know the guy doesn't have pictures. So you're trying to show that they have a lack of, evidence here. That's what defense attorneys do. He's told us everything he's done; never does he mention pictures. So we anticipate that in our strategy in cross-examining him, and going to point out to the jury the guy didn't take pictures, he's never told us about them, and discovery rules say you have to.
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> So I think what we first have to do for procedural purposes is determine whether it's a discovery violation at all. And from what I'm understanding, you're going to make a ruling that it's not a discovery violation: Is that accurate? (T 349-350).

Thereafter, Murdoch was recalled to the stand (T

353). Over Appellant's objection, photographs taken by him purportedly depicting that the road markings had remained unchanged between the time of the accident and Murdoch's site visit were admitted into evidence (T 354-361). At the conclusion of his pre-trial deposition, Murdoch had indicated that he would provide to defense counsel everything in his possession that was utilized to render his opinion (T 362). Thereafter, medical records pertaining to Tabitha Brooks and Michelina Zorbas were admitted into evidence by stipulation (T 363-364).

Albert Grella is the brother of the Appellant's deceased wife (T 364). Grella was notified of the accident by two police officers who awakened him in the following early morning (T 365). Grella went to the hospital where the Appellant was being treated approximately a mile from Grella's residence (T 366). As Grella was leaving the hospital, Appellant remarked that he had killed his wife, Grella's sister, and that he had been doing 80 to 90 miles an hour (T 367). Grella was unsure how long his sister was married to the Appellant and had no contact with them for approximately 20 years before the accident (T 370-371). During questioning, Grella blurted out, "What does this have to do with what I'm saying?" and "He killed my sister, he killed three children. Okay," prompting the prosecutor to express concerns about the possibility of a mistrial (T 371-372).

Former Pasco County Fire Rescue paramedic Dough Schwartz and his partner came upon the scene and helped a male and unresponsive female out of a Camaro which was beginning to catch fire (T 379). Schwartz also observed five individuals in the other vehicle (T 380). After the prosecution rested its case-in-chief, a motion for judgment of acquittal made by the Appellant was denied (T 381-391, 397-4040). A special jury instruction requested by the Appellant on the elements of vehicular homicide which provided that evidence of excessive speed alone was

insufficient to constitute reckless driving was denied (R88; T 405-406).

Following deliberations, the jury returned verdicts of guilty on the lesser-included offense of reckless driving as to count I and guilty verdicts as charged as to counts II through VI (R 111-116). Approximately 40 letters of support from friends and family members were submitted to the court for consideration (R 159-197). Appellant was adjudicated guilty of all offenses for which he was convicted and was sentenced to time served on count I as well as five (5) concurrent terms of 35 years in the Department of Corrections on count II through VI (R 249-259). A Motion for New Trial and Motion for Arrest of Judgment were denied (R 118, 119-120, 130-134, 288-296). This timely appeal follows (R 263, 278, 285, 287).

SUMMARY OF ARGUMENT

The trial court erred by failing to conduct a Richardson inquiry after a key prosecution witness testified concerning photographs which were undisclosed to the defense prior to trial. Inasmuch as the Court cannot conclude on the basis of the existing record that this error was harmless beyond a reasonable doubt, reversal and remand are required.

POINT ON APPEAL: THE TRIAL COURT ERRED BY REFUSING TO CONDUCT A RICHARDSON INQUIRY AFTER A KEY PROSECUTION WITNESS TESTIFIED CONCERNING PHOTOGRAPHS WHICH WERE UNDISCLOSED TO THE DEFENSE PRIOR TO TRIAL

John Murdoch is a self-employed consulting engineer (T 252). In July 2003, at the request of the prosecution,

Murdoch conducted his own independent investigation of the accident (T 256-257). Murdoch performed a momentum calculation based upon information that he was able to recreate through his investigation (T 264). In his opinion, the speed of the Camaro was 88.5 miles per hour prior to impact and 62.2 miles per hour at impact (T 284).

Murdoch visited the accident scene in August of 2003 to attempt to do the work without relying on the information compiled by Krause (T 295). After doing his own calculations, Murdoch telephoned Krause to find out where Krause came up with his numbers (T 295-296). One of the V1N numbers from one of the vehicles was even missing a digit (T 296-297).

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that he took at the scene because they were never produced (T 326, 339-340).

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Following arguments by counsel, the court declined to conduct a Richardson inquiry based upon its determination that no discovery violation had occurred and that defense counsel had "opened the door" to admission of the undisclosed photographs (T 344-350). Defense counsel then argued that "the only reason the door was opened, because they were not disclosed to us earlier by the expert when he gave his statement in deposition" (T 348). According to defense counsel:

> This situation is similar to, let's say, just I'll use the analogy, a DUI trial. The arresting

> officer never mentioning there's a videotape of what he's testifying to. And a defense attorney in cross-examination talking about, well, you know, you don't have a videotape. It happens all the time. And then him saying, yeah, sure I do, I just never told anybody about it. That's the same situation that we have here. You know, different set of facts, but the same type of thing.
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> So I think what we first have to do for procedural purposes is determine whether it's a discovery violation at all. And from what I'm understanding, you're going to make a ruling that it's not a discovery violation: Is that accurate?

(T 349-350).

Thereafter, Murdoch was recalled to the stand (T 353). Over Appellant's objection, photographs taken by him purportedly depicting that the road markings had remained unchanged between the time of the accident and Murdoch's site visit were admitted into evidence (T 354-361). Significantly, it was undisputed that the lane markers had been changed at some unspecified time after the accident (T

199-200). At the conclusion of his pre-trial deposition, Murdoch had indicated that he would provide to defense counsel everything in his possession that was utilized to render his opinion (T 362).

Standard of Review

> In determining whether a Richardson violation is harmless, the appellate court must consider whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense. As used in this context, the defense is procedurally prejudiced if there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Trial preparation or strategy should be considered materially different if it reasonably could have benefited the defendant. In making this determination every conceivable course of action must be considered. If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

State v. Schopp, 653 So. 2d 1016, 1020-21 (Fla. 1995).

Merits

When a defendant elects to participate in the discovery process, the prosecution has an ongoing duty under Florida Rule of Criminal Procedure 3.220(j) to disclose and provide discovery. When the State's failure to comply with the rules of discovery is brought to the court's attention, the court must conduct a Richardson hearing to determine if that failure has prejudiced the defendant.

While the trial court has discretion to determine whether a discovery violation would result in harm or prejudice to the defendant, the court's discretion can only properly be exercised after the court has made an adequate inquiry into all of the surrounding circumstances. Barrett v. State, 649 So. 2d 219 (Fla. 1994). At a minimum the scope of this inquiry should cover such questions as whether the State's violation was willful or inadvertent, whether the violation had a prejudicial effect upon the aggrieved party's trial preparation. State v. Evans, 770 So. 2d 1174 (Fla. 2000); State v. Hall, 509 So. 2d (Fla. 1987).

After properly considering these factors, the trial court has discretion to fashion an appropriate remedy. Wilson v. State, 789 So. 2d 1127 (Fla. 2d DCA 2001). However, reversal is required in those instance where the trial court fails to make a sufficient Richardson inquiry and it cannot be said beyond a reasonable doubt that the defense was not procedurally prejudiced. R.D. v. State, 842 So. 2d 863 (Ha. 2d DCA 2003). Moreover, it is the State's burden to establish that the error is harmless. Felton v. State, 812 So. 2d 525 (Ha. 2d DCA 2002), citing State v. Schopp, 653 So. 2d at 1020. Inasmuch as this Court cannot conclude on the existing record that the trial court's failure to conduct an adequate Richardson inquiry was harmless beyond a reasonable doubt, reversal and remand are required.

CONCLUSION

Based upon the arguments presented and the authorities cited herein, Appellant respectfully requests that this Honorable Court reverse his conviction and sentence herein and remand the case for further proceedings consistent with this Court's decision.

Respectfully submitted,
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the witness hereto being first duly sworn, was examined and testified as follows:

The Court: You may proceed.

Direct Examination

By Mr. Halkitis:

Q: Ma'am, if you would, could you give us your full name.

A. Michelina Zorbas.

Q. And, Ms. Zorbas, how old are you?

A. Thirty-nine.

Q. And I want to go back to Friday night, March 2nd, of 2001, if I might. Okay?

A. Yes, SIR.

Q. Do you remember anything at all about what happened after you left Walk-Mart heading towards Blackbuster?

A. Not clearly, no.

Q. Do you remember even driving a vehicle that night at all going from a dinner at a friend's restaurant in Tarpon Springs to the Walk-Mart?

A. No.

stipulated among the parties that Dr. Adams, a Medical Examiner for Hillsborough County, did the autopsy on the bodies of Desiree Posey and Ann-Marie Demerie and concluded that the crash on March 2nd, 2001 caused their deaths.

It is also stipulated among the parties that Dr. Hair, a Medical Examiner for the Pinellas and Pasco County, did the autopsy on the bodies of Robert Zorbas and Anthony Zorbas and concluded that the crash on March 2, 2001 caused their deaths.

The second stipulation reads as follows: It is stipulated among the State and the defense that the bodies of Robert Zorbas, Anthony Zorbas, Ann-Marie Demerie, and Desiree Posey were properly identified at the office of the Medical Examiner.

Judge, at this time, I'd like to have them filed and I'd like an instruction by the Court that they could consider this as if it were testimony.

THE COURT: Okay. They will be filed and, lady and gentleman, you are to consider that stipulated readings by Mr. Halkitis as though it.

recording of the scene taken that night, March 2nd of '01.

A. Yes, sir, I did.

Q. Now, with all this information, did you have any problem determining the speed of that Camaro prior to impact?

A. No.

Q. And can you give us your opinion as to the speed of the Camaro prior to impact?

A. Based on my calculations, it's 88.5 miles an hour.

Q. Any doubt in that?

A. No, sir.

Q. And were you able, based on crush damage, photographs, everything else utilized here, could you determine the speed at impact when the Camaro hit the Caravel?

A. The speed after sliding 265 feet was 62.2 miles an hour.

Q. Any doubt about that?

A. No, sir.

Q. Now, there was some discussion earlier about positraction. And I assume you were sitting in the courtroom and heard the questioning by defense counsel

lost control of the vehicle is the speed of the Plymouth, correct?

A. Yes.

Q. Okay. Because in this particular case we don't have skid marks or marks on the road that you were able to find or that were identified by highway patrol that were made by the Plymouth, correct?

A. None that I could find, no, sir.

Q. Okay. So in deciding how fast that Plymouth was going, essentially you have to rely on the information that was collected back on March 2nd of 2001, correct?

A. Yes.

Q. Which is what other people say they observed?

A. Yes.

Q. And I would—you can tell me different, but you didn't receive any specific information to tell you how fast that vehicle was going, correct?

A. None whatever, that I remember.

Q. I believe that Ms. Zorbas doesn't even recall since the accident occurred, and she was the driver.

A. I'm sure it's probably true.

A. That information could be used depending on how they described their relationship to the other vehicles. But I don't recall ever seeing any of that information to go that direction.

Q. Now, the speed limit's 45 miles an hour there?

A. Yes.

Q. And what you did when you did your calculations is you took what we'll call-- and I've got—there was Exhibit 3 from deposition. I don't know if you still have it.

A. Yes. I'm going to pull my original, but go ahead.

Q. Okay. Is you calculated the Plymouth's speed at three different speeds; 35 miles an hour, 45, and 55, correct?

A. Yes, sir, I did.

Q: So you took the speed limit of the road and then you went ten under, ten over, and those are assumptions that you're having to make in regards to making these calculations, correct?

A. Yes, sir. I've got an evaluation with four unknowns and only have information for two of them I have to figure out to get rid of one of the other

for your calculation, whether is be 35, 45, or 55, that is the speed of the Plymouth at the time of impact?

A. Yes.

Q. Okay. And if the Plymouth is going faster than even the 55 calculation, that changes it, correct?

A. Yes, sir. Raises the speed of the Camaro.

Q. Right. It would make it faster.

A. Yes, sir.

Q. The 62 that you came up with would actually be faster, correct?

A. Yes, sir.

Q. But if the Plymouth was going slower than 34 miles an hour, it reduces the speed of impact, correct?

A. Yes, sir.

Q. Okay. Because, under your calculations here that you've done in this case, if the Plymouth is going 35 miles an hour when it impacts with the Camaro, you have the Camaro going 47.3 miles an hour; is that correct?

A. Yes, I do. But you're mischaracterizing what I have written down there.

Q. Okay. Well, you're going to have to help me with that because I'm just trying to understand.

Q. All right. At 15 miles an hour, the Camaro's speed when he loses control is 82 miles an hour?

A. Correct.

Q. 82.6, correct?

A. That's correct.

Q. All right. And the number you were using or giving to the jury earlier about 88.5, that's at 45 miles an hour for the Plymouth, correct?

A. Yes.

Q. All right. So it looks like for about every ten miles of speed that the Plymouth is doing, you reduce or increase the Camaro's speed by like six miles an hour? I mean, I know it's not exact.

A. I'll agree to the generalization, yes, sir.

Q. Okay. Now, we don't know whether-- when Ms. Zorbas came around the corner into that intersection, where she saw the Camaro at all, do we?

A. No, I don't.

Q. We also don't know if she did see it, if she put her foot on the brake, correct?

A. I agree.

Q. And if she put her foot on the brake but not hard enough to leave a skid mark, let's say, but to slow the vehicle down, that Plymouth could be going substantially slower, could it not?

A. I agree.

Q. Okay.

A. For one thing, they're going to --

MR. PARRY: I don't have any other questions right now.

MR. HALKITIS: Judge, I'd like him to be able to explain his answer.

THE COURT: I'm going to give you that opportunity, Mr. Halkitis.

MR. PARRY: I just want to follow up and then you can explain.

Q. (By Mr. Parry) So if the Clines are testifying that they're going 45 to 50 but they're maintaining that 75 to 100 yard distance, then one of two things have to be going on here. Either the Clines are not correct about their speed or what they saw, correct?

A, Yes.

Q. Or the speed of the vehicles in front of them is not 80 or 90 miles an hour, correct?

A. That's one explanation, yes sir.

Q. Okay. Let's go back. When Mr. Demeric lost control of the vehicle at the point where-- because you've gone out to that scene and looked at it?

A. Yes.